

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DAVID TYLER MONTALDI,

Defendant-Appellant.

UNPUBLISHED

January 23, 2014

No. 312276

Macomb Circuit Court

LC No. 2011-000946-FC

Before: SAAD, P.J., and CAVANAGH and K. F. KELLY, JJ.

PER CURIAM.

Defendant appeals as of right his jury convictions on two counts of first-degree criminal sexual conduct (vaginal and anal penetration with a person under the age of 13 years), MCL 750.520b(1)(a), and one count of first-degree child abuse, MCL 750.136b(2). We affirm.

Defendant was babysitting his girlfriend's 13-month old daughter when the child suffered the following injuries: (1) four skull fractures (one in the front, one in the back, and one on each side of her head), (2) subdural brain hemorrhaging with hematomas in at least two locations, (3) sheering injuries to her brain, including of the tissue that connects the two halves of the brain together, (4) severe hemorrhaging in the three layers of her retinas in both eyes, (5) bruising across the entire length of her forehead, (6) a large abrasion on her chin, (7) a bruise under her chin, on the left side of her neck, (8) a complete tear of the labial frenulum (the tissue that connects the lip to the gum line), (9) a fractured left wrist, (10) a strained cervical ligament (it runs from the base of the skull to the base of the spine), (11) a bright red pronounced bruise on her left buttock, (12) two lacerations on her hymen, and (13) two tears on her anus. Medical experts in child abuse testified that: (a) skull fractures are caused by blunt force trauma; (b) brain hemorrhaging, sheering brain injuries, and retinal hemorrhaging (particularly in all three layers of the retina) are caused by rapid acceleration/deceleration motions, including shaking back and forth; (c) a torn labial frenulum is usually caused from something being shoved in the mouth; and (d) a cervical ligament strain is usually caused by severe whiplash.

According to the evidence, defendant was the only person with the child at the time the child suffered these injuries at his house. Defendant did not call for emergency medical assistance after the child suffered these injuries, although she was having difficulty breathing and he had to give her "rescue breaths." Instead, defendant called the child's mother at work and told her to come over. When the child's mother arrived and saw the child, she called 911

immediately. The child was first taken to Mt. Clemens General Hospital where she was placed on a respirator. The child was then transferred to St. John's Children's Hospital for extensive medical treatment and care. Defendant first told police that, while he was in the bathroom for ten or fifteen minutes, the child fell off the couch and his 200 pound dog sat on the child. Later defendant told his father in a recorded telephone call that he dropped the child down a flight of eight stairs and his dog fell down the stairs at the same time.

Defendant was charged with two counts of first-degree criminal sexual conduct and one count of first-degree child abuse. Defendant's first trial resulted in a mistrial being declared by the trial court after the jury was unable to reach a unanimous verdict. Following defendant's second trial, he was convicted as charged. This appeal followed.

Defendant first argues that there was insufficient evidence to support his first-degree criminal sexual conduct convictions. We disagree.

"This Court reviews de novo claims of insufficient evidence, viewing the evidence in the light most favorable to the prosecution, to determine whether a rational trier of fact could find that the essential elements of the crime were proved beyond a reasonable doubt." *People v Bennett*, 290 Mich App 465, 471-472; 802 NW2d 627 (2010). Generally, circumstantial evidence and the reasonable inferences that can be drawn from that evidence can constitute sufficient proof of the elements. *People v Carines*, 460 Mich 750, 757; 597 NW2d 130 (1999) (citation omitted). What inferences can be drawn from the evidence, the weight of those inferences and the evidence, as well as the credibility of the witnesses are questions for the jury and we will not interfere with the jury's decisions in these regards. *People v Hardiman*, 466 Mich 417, 428; 646 NW2d 158 (2002); *People v Wolfe*, 440 Mich 508, 514-515; 489 NW2d 748, amended on other grounds 441 Mich 1201 (1992); *Bennett*, 290 Mich App at 472.

To prove first-degree criminal sexual conduct under the theories charged in this case, the prosecutor had to prove that defendant engaged in sexual penetration with the child. MCL 750.520b(1)(a). "Sexual penetration" is defined as including any intrusion, "however slight, of any part of a person's body or of any object into the genital or anal openings of another person's body, but emission of semen is not required." MCL 750.520a(r).

In this case, defendant admits that medical expert testimony established that the child's genital and anal openings were penetrated; however, defendant argues that the evidence did not establish that he "committed such penetration." Establishing that the defendant is the perpetrator of the crime is an essential element in a criminal prosecution. *People v Oliphant*, 399 Mich 472, 489; 250 NW2d 443 (1976). Identity may be established by either direct testimony or circumstantial evidence. *People v Kern*, 6 Mich App 406, 409-410; 149 NW2d 216 (1967). Further, circumstantial evidence and reasonable inferences arising from such evidence may prove identification. *People v Bulmer*, 256 Mich App 33, 37-38; 662 NW2d 117 (2003).

Here, the alleged victim of the criminal sexual assaults was a 13-month old child; thus, she could not testify and there were no other eyewitnesses. However, the evidence established that defendant was the only person home with this child when she suffered numerous and life-threatening injuries to several parts of her body that were inconsistent with defendant's changing explanations for how the injuries occurred. Further, the medical expert testimony indicated that

the specific injuries the child suffered—including multiple skull fractures, subdural hematomas, sheering injuries, massive retinal hemorrhaging, facial and neck bruising, a strained cervical ligament, a torn frenulum, and bright red bruising on the buttocks—were not consistent with a 200-pound dog sitting on the child or with the child tumbling down an eight-step stairway with a dog as defendant claimed. Dr. Marcus DeGraw testified that the child’s massive retinal hemorrhaging, strained cervical ligament, sheering injuries, and bruised brain tissue resulted from a shaking mechanism. Dr. Mary Lou Angelelli also testified that the child’s injuries were consistent with shaking or slamming motions, i.e., an acceleration/deceleration mechanism of injury. And the child’s hymen (which is an internal structure) and anal lacerations were not consistent with defecation or cleaning actions as defendant had claimed; rather, they were consistent with penetration. Further, they testified that the bruising on the child’s neck, under her chin, as well as the tearing of her frenulum and the massive retinal bleeding are significant red flags suggesting physical child abuse. Moreover, the physical evidence located in defendant’s house included a soaking wet child’s red hoodie in the bathroom, as well as the child’s blood in various locations in the bathroom although during the police investigation defendant denied that he took the baby in the bathroom. This circumstantial evidence and the reasonable inferences arising from the evidence were sufficient for the jury to conclude beyond a reasonable doubt that defendant was the person who penetrated the child’s genital and anal openings. Accordingly, defendant’s claim is without merit. And, to the extent that defendant challenges the sufficiency of the evidence in his Standard 4 brief, such challenge is likewise rejected.

Next, defendant argues that his trial counsel was ineffective because he did not object when the prosecution’s expert medical witnesses testified that the child’s injuries were consistent with physical abuse. We disagree. Our review is limited to errors apparent on the record because a *Ginther*¹ hearing was not held.² See *People v Jordan*, 275 Mich App 659, 667; 739 NW2d 706 (2007).

“To prevail on a claim of ineffective assistance of counsel, defendant must show that (1) counsel’s performance fell below an objective standard of reasonableness under prevailing professional norms, (2) there is a reasonable probability that, but for counsel’s error, the result of the proceedings would have been different, and (3) the resultant proceedings were fundamentally unfair or unreliable.” *People v Brown*, 294 Mich App 377, 387-388; 811 NW2d 531 (2011).

Defendant argues the prosecution’s expert medical witnesses, Dr. Mary Lou Angelelli and Dr. Marcus McGraw, were improperly permitted to testify that this child was the victim of physical abuse without objection by his counsel. Defendant acknowledges that MRE 704 permits opinion testimony that embraces an ultimate issue to be decided by the trier of fact, but argues that opinion testimony as to a defendant’s guilt is prohibited. In support of his argument,

¹ *People v Ginther*, 390 Mich 436, 442-443; 212 NW2d 922 (1973).

² This Court denied defendant’s motion to remand for an evidentiary hearing. *People v Montaldi*, unpublished order of the Court of Appeals, entered April 26, 2013 (Docket No. 312276).

defendant relies on *People v Peterson*, 450 Mich 349; 537 NW2d 857 (1995) and *People v Beckley*, 434 Mich 691; 456 NW2d 391 (1990). Defendant's reliance is misplaced. In both of those cases the alleged child victims of sexual abuse testified and the defendants denied the allegations. Because of the delay between the claimed occurrences and the victims' "telling," there was no physical evidence to corroborate the victims' claims of sexual abuse; thus, the cases presented credibility contests between the alleged victims and the defendants. *Peterson*, 450 Mich at 352-354, 363; *Beckley*, 434 Mich at 698-699, 717. Expert medical witness testimony was permitted in both cases, generally for the purpose of explaining the victims' behaviors that might be construed as inconsistent with that of an actual abuse victim. *Peterson*, 450 Mich at 352-353; *Beckley*, 434 Mich at 733. The experts were not, however, permitted to vouch for the victim's credibility, testify that the sexual abuse occurred, or testify that the defendants were guilty. *Peterson*, 450 Mich at 352; *Beckley*, 434 Mich at 727-729.

In this case, the 13-month old child did not testify and this case was not a credibility contest between the child and defendant. More importantly, the purpose of the expert medical witness testimony was to describe and detail the child's physical injuries, not to explain the child's post-incident behavior as compared to certain behavioral characteristics recognizable in child sexual abuse victims. Further, defendant fails to reference any testimony by either physician where they opined that defendant was guilty of sexually abusing the child. Although the prosecution's expert medical witnesses testified that the child's injuries were consistent with physical abuse, they did not testify that defendant was the person who inflicted the physical abuse on the child. Thus, any objection by defense counsel to the challenged expert medical witness testimony would have been futile; accordingly, defense counsel was not ineffective for failing to object to the testimony. See *People v Ericksen*, 288 Mich App 192, 201; 793 NW2d 120 (2010); *Jordan*, 275 Mich App at 667.

Defendant also argues that he was denied the effective assistance of counsel because his attorney failed to present a substantial defense by: calling character and expert medical witnesses to testify, objecting to the exclusion of certain recordings, and properly cross-examining police witnesses regarding their incomplete investigation of this matter. We disagree.

"Trial counsel is responsible for preparing, investigating, and presenting all substantial defenses." *People v Chapo*, 283 Mich App 360, 371; 770 NW2d 68 (2009). "A substantial defense is one that might have made a difference in the outcome of the trial." *People v Kelly*, 186 Mich App 524, 526; 465 NW2d 569 (1990). The failure to call witnesses only constitutes ineffective assistance of counsel if defendant was deprived of a substantial defense. *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004). However, "[d]ecisions regarding what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy, and this Court will not substitute its judgment for that of counsel regarding matters of trial strategy." *People v Davis*, 250 Mich App 357, 368; 649 NW2d 94 (2002). But counsel may be deemed ineffective with regard to a strategic decision if the strategy employed was unreasonable or unsound. *People v Dalessandro*, 165 Mich App 569, 577-578; 419 NW2d 609 (1988).

First, defendant argues that his counsel was ineffective for failing to call character witnesses on his behalf. Defendant also raises this argument in his Standard 4 brief. However, defendant has failed to identify any such character witnesses and has provided no information as

to how they would have testified at trial. Thus, defendant has not demonstrated that the failure to call character witnesses deprived him of a substantial defense. See *People v Daniel*, 207 Mich App 47, 58; 523 NW2d 830 (1994).

Defendant also argues that his counsel was ineffective for failing to call an expert medical witness to testify, consistent with an article that he attached to his brief, that the child's injuries could have been caused by a stairway fall, thus rebutting the prosecution's expert medical witness testimony. Defendant also appears to raise this argument in his Standard 4 brief. However, defendant has failed to identify any such expert who he would have called to testify in this regard. Further, although the article identified some of the injuries this child suffered as potential injuries from a stairway fall, the article did not identify several of the other injuries that she suffered as possible fall-related injuries. Moreover, the article concludes that "[t]hese published reports of original data are discordant and controversial, making the correct classification of a young child's death following a report short fall a diagnostic challenge." In light of these considerations, defendant has not demonstrated that his counsel's failure to present expert medical witness testimony in this regard deprived him of a substantial defense.

Second, defendant argues that his counsel was ineffective for failing to object to the exclusion of certain unidentified video and audio recordings. In his Standard 4 brief, however, defendant more specifically argues that he was denied the effective assistance of counsel because the recordings of three telephone calls between himself and the child's mother "immediately following the catastrophic event in which [the child] was brutally injured" were not admitted into evidence. Defendant claims that these recordings were exculpatory in nature because they would have shown that "defendant made the decision to call 911," but did not immediately call because he was in a state of panic and the child could not be left unattended. However, decisions regarding what evidence to present are presumed to be matters of trial strategy which this Court will not second-guess. See *Davis*, 250 Mich App at 368. And defendant has failed to establish that he was deprived of a substantial defense because the recordings were not admitted. See *Kelly*, 186 Mich App at 526. Contrary to his claims, the recordings would have tended to establish that defendant had sufficient time, the physical ability, and the presence of mind to make several telephone calls to the child's mother instead of calling for emergency medical assistance for this grievously injured child. Further, it was only after the child's mother left work, drove to defendant's home, and saw her seriously injured child that the child's mother, not defendant, called for emergency medical assistance, which significantly delayed medical treatment. Thus, defendant's argument on appeal that his counsel was ineffective for failing to seek the admission of these recordings into evidence is without merit. He has neither overcome the presumption that his counsel's decision was a matter of trial strategy nor demonstrated that he was deprived of a substantial defense because of the omission of such recordings at trial.

Third, defendant argues that his counsel was ineffective for failing to cross-examine police witnesses regarding their investigation and collection of evidence. In his attached affidavit, defendant seems to claim that the police witnesses should have been questioned regarding their failure to collect or photograph certain evidence like hair, skin, and body fluids possibly located on the stairway. However, the testimony at trial was consistent that there was no evidence on the stairway when the police investigated the area after defendant told his father that he had dropped the child down the stairs. Further, as defendant notes in his Standard 4 brief, defendant's father purportedly "thoroughly cleaned" the basement stairs and landing area shortly

after this incident; thus, by the time defendant told his father that he had dropped the child down the stairs, any such evidence was non-existent. Therefore, the questioning that defendant suggests would have further emphasized that defendant lied to the police about how the child was injured and thereby delayed the police investigation, as well as thwarted their ability to collect evidence. And such cross-examination would have further emphasized that no evidence of a fall down the stairs existed in the stairwell area. Accordingly, defendant has failed to rebut the presumption that his counsel's failure to cross-examine police witnesses regarding their investigation and collection of evidence constituted sound trial strategy. See *Davis*, 250 Mich App at 368.

Fourth, in his Standard 4 brief defendant appears to argue that he was denied the effective assistance of counsel because his attorney did not object to certain witness testimony regarding the lack of injury to defendant's dog and certain evidence that was admitted, including certain items from defendant's house. However, defendant has not established that any such objection would have had merit. In any case, even if his counsel's performance in these regards fell below an objective standard of reasonableness, defendant has failed to establish that there is a reasonable probability that, but for such errors, the result of the proceedings would have been different and the resultant proceedings were fundamentally unfair or unreliable. *Brown*, 294 Mich App at 387-388.

In summary, defendant's several arguments on appeal in support of his claim that he was denied the effective assistance of counsel, including those made in his Standard 4 brief, are without merit. See *id.*

In his Standard 4 brief, defendant argues that prosecutorial misconduct denied him a fair trial. We disagree. Because this issue was not raised in the trial court, our review is for plain error that affected defendant's substantial rights. *People v Brown*, 279 Mich App 116, 134; 755 NW2d 664 (2008).

We review prosecutorial claims on a case-by-case basis by examining the record and evaluating the prosecutor's remarks in context. *People v Noble*, 238 Mich App 647, 660; 608 NW2d 123 (1999). The test of prosecutorial misconduct is whether the defendant was denied a fair and impartial trial. *People v Dobek*, 274 Mich App 58, 63; 732 NW2d 546 (2007).

Defendant first argues that the prosecutor presented "improper testimony" and "falsified testimony" during the trial. A prosecutor may not knowingly use false testimony to obtain a conviction. *People v Aceval*, 282 Mich App 379, 389; 764 NW2d 285 (2009). That is, "a conviction obtained through the knowing use of perjured testimony offends a defendant's due process protections guaranteed under the Fourteenth Amendment." *Id.* "If a conviction is obtained through the knowing use of perjured testimony, it 'must be set aside if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury.'" *Id.* (citations omitted).

Here, with regard to his claims that the prosecutor used improper or falsified testimony, defendant argues that the testimony of some of the witnesses was inconsistent with the facts or with their testimony in the first trial on this matter; thus, the prosecutor had an affirmative duty

to advise the trial court “that a witness was lying under oath.” Defendant gives several examples in support of his argument, including the following:

Deputy Jason Hayward testified that he administered a Breathalyzer test to defendant at the hospital and did not allow defendant to drive thereafter, but his report indicates that the Breathalyzer test was administered after defendant returned home from the hospital.

Deputy Ronald Murphy testified in the second trial that he tested for blood in front of the living room couch, but in his report and at the preliminary examination Deputy Murphy only indicated that he tested for blood in the bathroom.

Deputy Murphy previously testified that the dog was outside and that he did not examine the dog, but during the second trial he testified that the dog was in the house and that he examined the dog.

Detective Melissa Stevens also testified that she examined the dog, but that was not in her report. Detective Stevens further testified that the stairway area was uncluttered and there were no signs that a fall had occurred when she returned to defendant’s house days after the incident, but she knew that defendant’s father had previously cleaned up these areas.

Gail Lippert testified in the second trial that she had testified 75-100 times in court, which defense counsel questioned since she had testified in the first trial that she had testified 50 times in court. She also testified that the child’s injuries could not have resulted from being “stampeded” by a 200-pound dog, but defense counsel reminded her that in the first trial she testified that the injuries could have occurred.

Dr. Angelelli testified in the first trial that it was unlikely but possible that the child’s injuries could have resulted from being stampeded by a 200-pound dog, however, in the second trial she testified that it was impossible. She also testified in the first trial that bowel evacuation could occur after sustaining the type of injuries this child sustained, but in the second trial she testified that she does not see defecation from these types of injuries.

We have reviewed defendant’s claims. While it is true that some of the details provided by the prosecution’s witnesses differed from, or conflicted with, their prior testimony, there is no evidence that the prosecutor attempted to conceal the challenged testimony. See *Aceval*, 282 Mich App at 389. The prior testimony and police reports were all available to defendant’s attorney and he had ample opportunity to impeach the witnesses’ credibility at trial with their prior statements and written reports. See *People v Parker*, 230 Mich App 677, 690; 584 NW2d 753 (1998). Further, as defendant admits in his brief, his attorney did impeach some of the challenged witness testimony using prior testimony. Accordingly, defendant has failed to establish that he was denied a fair trial on the ground that the prosecutor knowingly used false testimony to convict defendant. See *Aceval*, 282 Mich App at 389.

Defendant also argues that he was deprived of a fair trial because the prosecutor made “improper comments to the jury during opening and closing arguments.” Again, defendant gives several examples in support of his claims. Defendant challenges, for example, the prosecutor’s opening statements regarding a telephone call between the child’s mother and defendant during which the child’s mother questioned defendant about the child’s injuries because she was told by hospital personnel that they were not consistent with a dog sitting on the child—as defendant had told her. The prosecutor noted that at the time, the child’s mother did not know that the child had suffered injuries to her anus, yet defendant commented: “What do you think, I stuck my dick in?” Defendant argues that the prosecutor’s statement was improper because it was refuted by trial testimony. However, during the prosecutor’s direct examination of the child’s mother, the prosecutor asked if she was aware of the child’s anal injuries when she confronted defendant “about his account of what happened,” and the child’s mother responded in the negative. During cross-examination of the child’s mother, when she was asked if there was any discussion about the child’s anal injuries before the comment was made, the child’s mother testified: “Not that I recall. I don’t know. I don’t remember exactly every little thing with the conversation.” The telephone call was recorded and a transcript of the call was made. The recording was played for the jury and they received a copy of the transcript. Thus, in light of the evidence, the prosecutor’s remarks made during opening statements in this regard were not improper or misleading.

Defendant also challenges statements the prosecutor made during closing argument in which she implied that defendant did not tell the medical personnel attending to the child that she had vomited and had diarrhea. Defendant argues that this was a misstatement of fact because he did not talk to the medical staff at the hospital. However, review of the record reveals that the prosecutor was referring to the fact that defendant did not tell the emergency medical personnel who responded to his house, or the police when they arrived at defendant’s house, that the child had vomited and had diarrhea. In fact, he did not mention any vomiting or diarrhea until much later in a communication with the child’s mother. Thus, the prosecutor’s remarks during closing argument in this regard were not improper or misleading.

Defendant also challenges as improper and misleading the prosecutor’s statement during closing argument that any penetration was sufficient to establish the criminal sexual conduct charges. Defendant argues that this was a misstatement of the law because the prosecutor had to prove that penetration was a sexual act or was for a sexual purpose. We disagree.

The prosecutor stated during closing argument that she had to prove defendant “engaged in a sexual act that involved entry into the genital opening by an object. Any entry no matter how slight is enough. It does not matter whether the sexual act was completed or whether semen was ejaculated.” The prosecutor also stated: “Now whether or not this defendant was doing it for a sexual purpose, whether or not it was for sexual gratification, whether or not he was just angry with her and she was crying and he couldn’t control her, whether it was done in anger, sexual purpose, sexual gratification, it doesn’t matter. It is not one of the elements. I don’t have to prove to you why he did this. [All] I have to prove to you is that she was penetrated, and that this defendant did that.” The prosecutor did not misstate the law. Pursuant to MCL 750.520b(1)(a), the prosecutor had to prove that defendant engaged in sexual penetration with the child. The definition of “sexual penetration” includes any intrusion, “however slight, of any part of a person’s body or of any object into the genital or anal openings of another person’s

body, but emission of semen is not required.” MCL 750.520a(r). A prosecutor is not required to show that the perpetrator of a sexual penetration had any particular criminal intent to obtain a conviction. See *People v Nyx*, 479 Mich 112, 117-118; 734 NW2d 548 (2007). Second-degree criminal sexual conduct, MCL 750.520c(1), which prohibits “sexual contact” under certain circumstances, requires proof of one of several intents, *Nyx*, 479 Mich at 118. The definition of “sexual contact” includes “intentional touching of the victim’s or actor’s intimate parts or the intentional touching of the clothing covering the immediate area of the victim’s or actor’s intimate parts, if that intentional touching can reasonably be construed as being for the purpose of sexual arousal or gratification, done for a sexual purpose, or in a sexual manner” for revenge, to inflict humiliation, or out of anger. MCL 750.520a(q). However, defendant was not charged with second-degree criminal sexual conduct. Accordingly, defendant’s argument that the prosecutor misstated the law is without merit.

In summary, defendant has failed to establish that prosecutorial misconduct denied him a fair and impartial trial. See *Dobek*, 274 Mich App at 63.

Finally, defendant argues in his Standard 4 brief that the cumulative effect of errors denied him a fair trial. However, defendant has not established any errors that occurred at his trial; thus, his claim that the cumulative effect of errors denied him a fair trial is without merit. See *People v Mayhew*, 236 Mich App 112, 128; 600 NW2d 370 (1999).

Affirmed.

/s/ Henry William Saad
/s/ Mark J. Cavanagh
/s/ Kirsten Frank Kelly